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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 830

MELVIN HYMAN, AS TRUSTEE IN BANKRUPTCY OF JOSEPH BENJAMIN LANE, AND JOSEPH BENJAMIN LANE,
Petitioners,

vs.

R. W. McLENDON, W. E. McLENDON, AND C. E. McLENDON.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT OF THE PETITION.

SAM J. ROYALL,
J. J. WRIGHT,
C. B. RUFFIN,
M. W. SEABROOK,
Counsel for Petitioner.

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R. W. McLENDON, W. E. McLENDON, AND C. E. McLENDON.

PETITION.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully present to this Court their petition for a writ of certiorari, addressed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said court and the clerk thereof to certify to this Court the record and proceedings of the case in said court, wherein your petitioners were the appellants, together with the opinion of the Circuit Court of Appeals for the Fourth Circuit, for the review and determination of said cause by this Honorable Court.

Reasons Relied Upon for the Allowance of the Writ of Certiorari.

The reasons relied upon for the issuance of said writ of certiorari, and upon which your petitioner believes that

the same should be issued, and which will be more fully stated hereinafter, may be summarized as follows:

The Circuit Court of Appeals for the Fourth Circuit has decided an important question of Federal law which has not been, but should be settled by this honorable Court; or has decided a Federal question in a way probably in conflict with applicable decisions of this honorable Court, to wit:

The Honorable Circuit Court of Appeals erred, it is respectfully submitted, in holding that the District Court of the United States for the Eastern District of South Carolina had jurisdiction to adjudicate the controversy here involved; which was error because the Respondents R. W. McLendon, W. E. McLendon and C. E. McLendon were adverse claimants, and under title 11, U. S. Code, Section 46, a suit like this must be brought in the Court which would have had jurisdiction in the absence of bankruptcy; which was the State Court; and the Honorable Circuit Court of Appeals erred in holding that jurisdiction was conferred on the Bankruptcy Court by consent merely because, when the McLendons petitioned the Court to adjudicate the matter in controversy, and the Court ordered that this be done, the consent of the Trustee automatically followed the Order; which was erroneous because neither the Bankrupt nor his Trustee have ever in fact consented to the jurisdiction of the Federal Court, and a correct interpretation of the statute requires that all parties concerned must concur to make such consent; and the Court having previously authorized and empowered the said Trustee to pursue the cause of action either in the Court of Common Pleas for Lee County, South Carolina, or in such other jurisdiction as may be advised and as the Trustee shall direct; and the action having been properly commenced by the bankrupt in the State Court which had first acquired

jurisdiction of the *res* to the exclusion of the Federal Court.

That the District Court had no jurisdiction to make the order of September 1, 1938; because, under the circumstances related here, the jurisdiction was vested in the State court is demonstrated by such cases as *Danciger* v. *Smith*, 276 U. S. 542, 72 L. Ed. 691, 48 S. Ct. 344; *Johnson* v. *Collier*, 222 U. S. 538, 56 L. Ed. 306, 32 S. Ct. 104, and others cited in our brief.

A more detailed statement of all the questions that are involved is set forth in the brief subjoined to this Petition, reference to which is craved as if set forth herein.

Statement of Facts and Proceedings.

The following factual statement, taken to a large extent from the opinion of the Circuit Court of Appeals (140 F. (2nd) 76, 78) forms the basis of the Assignment of Error which has been filed, to wit:

On September 24, 1935, the Petitioner, Dr. Lane filed a voluntary petition in bankruptcy and was adjudged a bankrupt. It was thought that the assets disclosed did not justify the appointment of a trustee and no trustee was then appointed. Dr. Lane was granted a discharge on January 20, 1936. On May 28, 1936, he instituted a suit in the Court of Common Pleas of Lee County, South Carolina, against the Respondents, charging R. W. McLendon with fraud and asking that the lands, which were embraced in the mortgage, be impressed with a trust and for an award of damages with respect to such of them as the court could not reach.

The McLendon defendants duly answered in the State Court (Stipulation, items 5 and 6, on page 3 of Record; and paragraph 3 of Answer, page 29 of Record).

On July 3, 1936, the McLendons, who were defendants in the suit instituted in the State court, filed a petition with

the court of bankruptcy asking that the discharge of the bankrupt be set aside, that a trustee of his estate be appointed and that the trustee be authorized to bring before the bankruptcy court for adjudication the matters involved in the suit in the State court. After a hearing on this petition, the bankruptcy court revoked the order of discharge and directed that a trustee in bankruptcy of the estate of the bankrupt be appointed.

Later a trustee of the estate of the bankrupt was appointed and the bankruptcy court designated counsel to represent him in the prosecution of the claim against the McLendons.

On December 1, 1937, the said trustee petitioned the District Court for authority to engage counsel, which resulted in the order of his Honor Judge Frank K. Myers, dated December 17, 1937 (R. 42), which authorized the employment of counsel, and concluded with these words:

> "All the said counsel to represent the said Trustee and to pursue the cause of action as set out in the complaint in the pending cause, either in the Court of Common Pleas for the County of Lee, or in such other jurisdiction as may be advised, as the Trustee shall direct."

The Trustee, Melvin Hyman, served on attorneys for the McLendons notice of an application to be heard on April 4, 1938, by the Presiding Judge in the State Court for an order allowing the complaint in the action commenced in the State Court by Joseph Benjamin Lane against the McLendons to be amended by making him, the said Melvin Hyman, as Trustee in Bankruptcy, a co-plaintiff therein. (See recitals in Order of his Honor, Judge F. K. Myers, dated September 1, 1938, on page 41 of Record, and Answer on page 29 of Record); showing that the Trustee tried to

intervene in and prosecute the action pending in the State Court.

On March 25, 1938, R. W. McLendon and the other defendants in the suit pending in the State court, filed summons and petition in the Bankruptcy Court, setting forth the pendency of the suit in the State Court, and asking the Court of Bankruptcy to adjudicate the matters there in controversy (R. 21) by way of a declaratory judgment and decree under the Federal Declaratory Judgments Act, of June 4, 1934 (48 Stat. at L. 955, Chap. 512; Judicial Code, Sec. 274 D; Title 28 U. S. C. A. Sec. 400) (R. 28). Answer was filed to this petition by counsel for the trustee, denying the jurisdiction of the Court of Bankruptcy, and alleging that exclusive jurisdiction in the matter rested with the State Court. The District Judge, Honorable F. K. Myers, on September 1, 1938, entered a decree, striking out the answer of the trustee enjoining him from proceeding with the prosecution of the suit in the State Court, holding that exclusive jurisdiction to determine the matters in controversy rested with the Court of Bankruptcy, and referring these matters to a special master for hearing on the merits (R. 41).

There was an appeal from the order of Judge F. K. Myers, dated September 1, 1938, which took jurisdiction into the United States Court and enjoined the proceedings which had been commenced in the Court of Common Pleas for Lee County, South Carolina. The appeal was dismissed by the Circuit Court of Appeals; because (1) not taken within time, and because (2) it was not a final order. *Hyman* v. *McLendon et al.*, 102 F. (2d), 189. Neither of these infirmities now exist as there has been a final judgment on the merits.

Before the mandate went down on the former appeal, a motion was made by appellant based on a petition for a

writ of prohibition and mandamus to prohibit the District Court from proceeding with the case and to compel that Court to remand the case to the State Court. The Circuit Court of Appeals denied this application on April 10, 1939. *Hyman* v. *McLendon,* 103 F. (2d), 294. *Certiorari* was denied by the Supreme Court October 9, 1939. 308 U. S., 563, 60 S. Ct., 74, 84 L. Ed., 472.

That application for certiorari was directed to the questions of whether the appeal had been taken in time, and whether or not it was from a final order. It was contended that the suit was a plenary suit, hence not subject to Title 11, Sections 47 and 48 of the U. S. Code, limiting the time for appeals in bankruptcy matters to thirty days, and that it could have been taken within three months provided by Title 28, Section 230. It was also contended that inasmuch as a jurisdictional matter was involved, the judgment was final. The Court below specifically overruled both of these pleas; and *no Appellate Court then passed on the question of jurisdiction,* which was ruled on specifically for the first time on January 10th, 1944, by the Circuit Court of Appeals (140 F. (2nd) 76). It is to this last ruling or decision that the present application is directed, and the former is in no sense *res adjudicata* as to the questions now raised.

The Circuit Court of Appeals then said, (103 F. (2nd) 294):

> "As the order entered in the bankruptcy proceeding could have been reviewed on appeal taken within the time allowed by statute, and as error, if any, in the lower court's holding as to jurisdiction can be corrected on appeal from final judgment, we think it clear upon the face of the proceedings, without requiring answer by the judge below, that the application for the writs should be denied." (Emphasis added.)

Pursuant to this the case has been tried, and a final judgment against appellants rendered by Judge Waring, dated March 11, 1943 (page 76 of Record).

There are a few points of fact that we desire to stress here, to wit:

(1) No trustee was appointed prior to the discharge in bankruptcy, and the reopening thereof.

(2) The action in the State Court was commenced May 28, 1936, in the interim between the discharge in bankruptcy and the reopening of the bankruptcy proceedings.

(3) The McLendons fully answered to the merits in the State Court.

(4) On December 1, 1937, the Trustee petitioned the Court for authority to engage counsel. This resulted in the order of his Honor Judge Myers dated December 17, 1937, above quoted from.

(5) That the trustee in bankruptcy elected to try to join as a party to the proceedings pending in the State Court.

Your petitioners respectfully submit that under the facts and circumstances above set forth, and under the authority of such cases as *Danciger* v. *Smith*, 276 U. S. 542, 72 L. Ed. 691, 48 S. Ct. 344; *Johnson* v. *Collier*, 222 U. S. 538, 56 L. Ed. 306, 32 S. Ct. 104, and other authorities cited in the brief of petitioner, the United States District Court for the Eastern District of South Carolina was clearly without jurisdiction of this matter, and the lawful jurisdiction thereof rested solely and exclusively in the Court of Common Pleas for Lee County, South Carolina.

The judgment complained of allowed parties, who are

adverse claimants to, and debtors of the bankrupt estate, to practically control the course of the litigation and select the forum. It took away the right of petitioners and the bankrupt to a trial before a jury of Lee County, South Carolina, where both of the real parties in interest reside.

The appeal was argued before the Circuit Court of Appeals at Richmond, Virginia, on October 12, 1943, and was decided January 10, 1944 (140 F. (2d) 76).

The mandate of the Circuit Court of Appeals was duly stayed by order of the Senior Circuit Judge; and the case is thus still in the Circuit Court of Appeals.

Your petitioners fully amplify their grounds for requesting that a writ of certiorari be ordered herein, in their brief which is sub-joined, reference to which is craved, and in which we believe there will be demonstrated upon valid authority and reason the right and necessity for this cause being heard and adjudicated by the Honorable Supreme Court of the United States.

Your petitioners present herewith a certified copy of the relevant parts of the record, including the proceedings in the Circuit Court of Appeals for the Fourth Circuit, and the opinion of said court, and state that the record below reposes in said court.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, sitting at Richmond, Virginia, commanding the said court to certify and send to this Court, on a day to be designated, a transcript of the record and all proceedings of the said United States Circuit Court of Appeals for the Fourth Circuit, had in this cause, to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law; that its judgment may be re-

versed by this Honorable Court; and for such further relief as may be proper.

And your petitioners will ever pray, etc.

SAM J. ROYALL,
Florence, S. C.,
J. J. WRIGHT,
Florence S. C.,
C. B. RUFFIN,
Bishopville, S. C.,
M. W. SEABROOK,
Sumter, S. C.,
Counsel for Petitioner.

STATE OF SOUTH CAROLINA,
County of Sumter, ss:

MARION W. SEABROOK, being duly sworn, on oath deposes that he is of counsel for petitioners Melvin Hyman, as trustee in bankruptcy of Joseph Benjamin Lane, bankrupt; and said Joseph Benjamin Lane; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied the transcript of record which is to accompany the same, being the transcript of the revelant parts of the record in the case at bar; that the matters in said petition are, in the judgment of this affiant, duly supported in and by said transcript of record, and that he knows of the above proceedings had, and that the facts in said petition herein stated are true, to the best of his knowledge and belief.

MARION W. SEABROOK.

Subscribed and sworn to before me this 21st day of March, 1944.

A. S. MERRIMOE,
[SEAL.] *Notary Public in and for the State of South Carolina, Residing at Sumter, South Carolina.*

I do hereby certify that I have carefully examined the foregoing petition for a writ of certiorari, and the allegations thereof are true, as I verily believe, and in my opinion the petition is well founded, and the case is one in which the prayer of the petition should be granted by this Court.

MARION W. SEABROOK,
Of Counsel for Petitioner.